

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

SUNSTEEL, LLC,

Employer,

v.

IRON WORKERS DISTRICT COUNCIL OF
THE PACIFIC NORTHWEST, AFL-CIO,

Petitioner.

No. 19-RC-261739

UNION'S RESPONSE IN OPPOSITION
TO SUNSTEEL'S REQUEST FOR REVIEW
OF REGIONAL DIRECTOR'S DECISION
AND DIRECTION OF ELECTION AND
REQUEST FOR IMMEDIATE STAY OF
MAIL BALLOT ELECTION

I. INTRODUCTION

On July 21, 2020, the Regional Director for Region 19 issued a Decision and Direction of Election (DDE) ordering a mail ballot in this case. The Regional Director's Decision was based on the COVID-19 pandemic. The Regional Director's concerns were not abstract or speculative – Yakima County, where SunSteel is located, is the single most impacted County in the State of Washington. The disease has made its presence felt within the Employer's facilities, with at least 22 employees testing positive. The Regional Director did not abuse his discretion in determining that in these circumstances, a mail ballot election that avoids the risks associated with in-person contact was the most prudent option. No compelling reasons exist for reviewing the Regional Director's decision and the Employer's Request for Review should be denied.

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REQUEST FOR REVIEW - Page 1 of 9

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II. ARGUMENT

A. No compelling reasons exist for granting the Request for Review.

29 C.F.R. 102.67 limits the Board's jurisdiction to review Regional Directors' Decisions in representation cases to certain circumstances, including when a decision involves (a) a substantial question of law or policy, (b) a clearly erroneous decision on a factual issue, (c) prejudicial procedural errors, or (d) a compelling reason to reconsider an important Board rule or policy. None of those circumstances are met here and review of the Regional Director's DDE must be denied.

The Employer asserts that this case presents a substantial question of law or policy based on the absence of "officially reported Board precedent" to support directing a mail ballot election based on COVID-19. Req. for Rev. at 1. 29 C.F.R. 102.67 supports granting a Request for Review when a case presents a substantial question of law or policy because of the absence of officially reported Board precedent. However, the Regional Director's decision was founded in long-standing precedent regarding the Regional Director's discretion in deciding whether to direct a manual or mail ballot election. In *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998), the NLRB recognized that while Board elections should, as a general rule, be conducted through manual elections, and specifies well-settled guidelines for determining whether a mail-ballot election would normally be appropriate, "there may be other relevant factors that the Regional Director may consider in making this decision." The Board noted that "extraordinary circumstances" could permit a Regional Director to exercise his or her discretion outside of the guidelines set forth in that decision. *Id.*

It is not the case that the Request for Review presents a substantial question of law or policy because of the absence of Board precedent. Board precedent squarely addresses the

question of how a Regional Director should make decisions about whether to direct a manual or mail ballot election. The fact that the Employer does not agree with the Regional Director's decision on that issue does not mean that the decision was not based on precedent. In fact, the DDE discussed and applied Board precedent, including the seminal *San Diego Gas & Electric* decision as well as more recent Board authority applying those principles to the COVID-19 pandemic. DDE at p. 4.

Moreover, the Employer cannot manufacture an absence of Board precedent by framing the question presented around the specific facts of this case, i.e. whether the Regional Director had discretion to order a mail ballot election "based solely on the existence of COVID-19." The fact that the precise factual scenario involved in a given case has not been the subject of an officially reported decision cannot be equated with an absence of Board precedent. Were that the case, almost every Request for Review would present some new subtle factual distinction to warrant review.

Here, the Regional Director applied longstanding principles articulated by the Board to circumstances the Board itself has had occasion to address repeatedly in the last several months.¹ Simply put, this case does not present the type of substantial question of law or policy warranting review.

B. The Regional Director correctly concluded that the COVID-19 pandemic presented extraordinary circumstances making a mail ballot election necessary.

As noted, it is well-established that Regional Directors may consider extraordinary circumstances in determining whether a mail ballot election should be ordered, even in circumstances beyond those addressed in the *San Diego Gas & Electric* framework. The

¹ Petitioner is aware of at least 11 cases in which Requests for Review of DDEs directing mail ballots were denied.

highly-infectious and dangerous coronavirus unquestionably presents such circumstances, making a mail ballot election the most appropriate option. The Regional Director noted that Yakima County, where SunSteel is located, “is the most severely impacted of Washington’s 39 counties.” DDE at 5. At the time of the DDE, Yakima County had approximately 8,300 cases of COVID-19. Just two weeks later, Yakima County has now reported 10,047.² The General Counsel’s election protocols specifically note that one of the factors that should be taken into account in determining whether a mail or manual election should occur is “the status of pandemic outbreak in the election locality.” GC Memorandum 20-10 (July 6, 2020). Despite the Employer’s attempt to minimize the Regional Director’s reasoning ordering a mail ballot “solely on the existence of COVID-19 in Yakima County,” it was entirely appropriate for the Regional Director to take the extreme situation of Yakima County’s uncontrolled outbreak into account.

The Employer argues that “at some point,” life must go back to normal and the Board must overturn a decision mandating mail ballots. It is no doubt true that at some point in time, Regional Directors and the Board will be called upon to make the difficult decision of whether it is safe enough to direct a manual election. Now is not that time. COVID-19 cases are on the rise in Washington.³ Indeed, as the Regional Director predicted might be the case, in light of the trend in Washington of increasing COVID-19 infections, the circumstances

²<https://www.doh.wa.gov/Emergencies/NovelCoronavirusOutbreak2020COVID19/DataDashboard>.

³ 6 Months Since We Had the Nation’s First Diagnosis, Here’s How Washington’s COVID-19 Fight Is Going, SEATTLE TIMES, July 26, 2020 available at <https://projects.seattletimes.com/2020/coronavirus-covid-19-washington-state-virus-pandemic-fight-six-months-july-charts/> (citing Ruth Etzioni et al, Situation Report 9: COVID-19 Transmission across Washington State, Results as of July 17, 2020 for the finding “Washington State as a whole is in an explosive situation. Transmission continues to increase or accelerate across most of Washington state and will continue to do so unless concrete steps are taken to stop the spread.”).

here in Washington State are direr today than when the Regional Director ordered a mail ballot election just two weeks ago. In response to the worsening situation, on July 23, 2020, Washington State has rolled back reopening including announcing new limitations on eating out, going to the gym, attending entertainment venues, and wedding and funeral services.⁴ The State also adopted a new masking requirement on July 25, 2020.⁵ On July 31, 2020 in recognition of the continuing state of the pandemic, the Governor extended 25 proclamations related to COVID-19.⁶ Thus, life has not yet returned to normal, and it would be irresponsible to pretend that it has. Moreover, as the Regional Director noted, the General Counsel’s “Suggested Manual Election Protocols” memo merely provides guidance on how to safely conduct a manual election when and *if* a manual election is deemed appropriate – it does not purport to mandate manual elections. GC Memorandum 20-10 (July 6, 2020) (“In the end, the decisions on election procedures and the safety of all participating in an election remain in the sound discretion of the Regional Director”). Precautions like plexiglass shields may minimize risk, but they cannot eliminate it. That’s why the General Counsel’s suggested election protocols emphasize that these decisions are to be made on a case-by-case basis. The Regional Director was entirely within his discretion to determine that it was more appropriate to avoid the risk altogether than to minimize it. DDE at 5 (“When an area is experiencing the spread of pandemic disease to the extent of Yakima County simply mitigating the risk may not be the best course of action.”).

⁴<https://www.governor.wa.gov/news-media/inslee-extends-safe-start-proclamation-eviction-moratorium>.

⁵ https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/Secretary_of_Health_Order_20-03_Statewide_Face_Coverings.pdf?utm_medium=email&utm_source=govdelivery.

⁶ <https://www.governor.wa.gov/news-media/inslee-extends-25-proclamations-relating-covid-19>.

The Regional Director did not rely on facts raised by Petitioner regarding an outbreak of COVID-19 that occurred in the Employer's plant shortly before the DDE was issued, finding that it was unnecessary to consider such facts in light of the severity of the outbreak in Yakima County generally and the risks associated with conducting a manual ballot. He noted, however, that if it were a closer question, "it might be necessary to explore these specific facts further." Had the Regional Director found it necessary to conduct an administrative investigation, he would have found that at least 22 employees at SunSteel have tested positive for COVID-19. While the Regional Director did not need to address the increased risks associated with the election occurring not just in "the most severely impacted of Washington's 39 counties," but also in a plant in which a COVID-19 outbreak had occurred at the workplace, it is significant to note that this was an alternative basis upon which the Regional Director could also reasonably have concluded supported his decision to issue a mail ballot election. Had the Regional Director found it necessary to look beyond the crisis unfolding in Yakima County regarding COVID-19 and assess "safety specific to the circumstances and precautions at the Company's facility," that assessment would only have confirmed that a mail ballot election is the only safest option for this facility.

The Employer claims that a mail ballot will result in reduced voter turnout. The Employer raised this argument in its position statement to the Regional Director, who recognized the concern with potential reduced turnout but concluded that "the extraordinary circumstances presented by the COVID-19 pandemic" nonetheless warranted a departure from the traditional preference for manual elections. DDE at 4. Moreover, as this Board has observed, concerns about voter disenfranchisement may be addressed through the election objection process if either party believes that actual disenfranchisement has occurred. *See*

TDS Metrocom, LLC, Case No. 18-RC-260318 (June 23, 2020) (rejecting Request for Review of mail ballot election directed as a result of COVID-19, noting that “any party is free to present evidence of any actual disenfranchisement of voters, if applicable, in post-election objections.”).

Finally, the Employer argues that the DDE is “inapposite to the General Counsel’s Memorandum 20-10.” But that Memorandum reiterates the discretion of Regional Directors to make “decisions about when, how, and in what manner all elections are conducted,” considering variable such as “the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and **the status of pandemic outbreak in the election locality.**” *Memorandum GC 20-10* (emphasis added). Moreover, as the Regional Director noted, the Memorandum’s suggestions for manual election protocols do not create a “checklist” entitling a party to a manual election if it can meet the suggested protocols. The General Counsel Memorandum did not purport to divest Regional Directors of their discretion to determine the manner of elections, but instead reaffirmed this discretion in light of the pandemic. *Id.*

III. CONCLUSION

For the foregoing reasons, the Employer’s Request for Review should be denied. The Regional Director appropriately decided that a mail ballot was the safest way to conduct the election in light of COVID-19 and the outbreak taking place in Yakima County. The Regional Director’s Decision should stand and a mail ballot election should proceed.

RESPECTFULLY SUBMITTED this 4th day of August, 2020.



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CERTIFICATE OF SERVICE

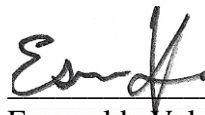
The undersigned certifies that on the 4th day of August, 2020, the above and foregoing document was served filed via the NLRB's electronic filing portal and served by electronic mail to the following:

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Dated this 4th day of August, 2020.



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